In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 349

SOUTHERN PACIFIC COMPANY, a Corporation,
Petitioner,

vs.

MARY MILLER, Administratrix of the Estate of Fred A. Miller, Deceased,
Respondent.

Petitioner's Reply Brief

Since respondent's brief recognizes that the question posed by the petition in this case is whether Mr. Justice Holmes' opinion for the full court in *Kansas City So. Ry. Co. v. Jones,* 276 U.S. 303, can be ignored by State courts, or is to be overruled sub silentio, little in the nature of a reply is called for.

Respondent's brief says that restatement of the facts is necessary "by reason of the inaccurate statement of the facts, by the petitioner". Since the petitioner relied upon the statement of the facts in the opinion of the court below, no comment is necessary.

Respondent's brief says that as deceased stood alongside the locomotive of his train, there was no place for him to step between either the units of the locomotive or the cars. This statement is wholly gratuitous. He could have stepped between the units of the diesel simply by going to the end of one of those units and stepping into the space between it and the next unit.

There is an attempt to distinguish *Kansas City So. Ry. Co. v. Jones,* 276 U.S. 303, upon the ground that in that case there was no evidence that the deceased was engaged in his work at the time he was injured, while here the deceased was engaged in his work. Far from there being a distinction in this respect, the two cases are the same. In both cases the deceased was in the general course of his employment. In the *Jones Case,* the deceased was in and about the yard in the course of his employment as an inspector. In the case at bar, Miller was near the head end of his train in the general course of his work as a brakeman. But in neither case was there any evidence as to what the deceased was doing as the train which struck him approached. In the case at bar, there was no evidence that the deceased was near the main line for the purpose of receiving a signal, and the undisputed evidence, whether the deceased had been told this or not, was that it could not be anticipated that a signal from the rear end would be given by use of a red fusee in the face of an approaching passenger train.

The only new matter in respondent's brief is a reference to *Leet v. Atchison, etc. Ry. Co.*, 66 CA2d 413, 152 P2d 351. Two things are to be said of the *Leet Case*.

If the *Leet Case* has any significance wider than a decision upon its own peculiar facts, it is in irreconcilable conflict with *Kansas City Ry. Co. v. Jones*, above, and the cases cited at pp. 13-15 of our petition.

In the second place, the *Leet Case* is quite different from the case at bar, and the comparison of the two cases will do no more than fortify what was said in the petition. For the court's convenience, we compare them.

The decision in the *Leet Case* sustained a judgment for the plaintiff in an action for damages for death of a brakeman struck by a passenger train that was proceeding at high speed. The court held that there was evidence sufficient to warrant submission to the jury of the issue whether the speed of the train had proximate causal connection with the accident. The facts were such that the speed in that case could have had connection with the accident since it bore both on the conduct of the deceased and on the conduct of the engineer of the train after he saw the deceased. The facts are radically different from those in the case at bar.

The *Leet Case*:	The case at bar:
Deceased (Waits) was head brakeman of a westbound freight train which was stopped at a refueling station known as Marmon. The railroad was double track, but operated "left-handed" so that the westbound train was on the track to the south and the passenger train, the Chief, operated eastward on the track to the	To the north, the direction from which the passenger train came, the tracks were straight not for a mere 1200 feet but for 4.1 miles.

The *Last Case:*

north. There was a slight down grade from west to east. To the west the tracks were straight for about 1200 feet and then curved to the south[1] and then to the north around a high bluff.

At the point where the head end of the passenger train was stopped, cinders were cleaned from coal-burning engines and were taken across and piled north of the northerly or eastbound tracks and "there was ample evidence to show that the cinder pile rose quite abruptly in close proximity to the northerly track and was quite deep a few feet therefrom" and there was evidence that anyone walking on the pile found the walking rough and his feet would sink in. There was a conflict as to where the hot ashes lay and where the pile was smoking.

At the point where the head end stopped there were refueling, rewatering and cleaning operations that made a great deal of noise "and dust which made it difficult to hear and see." The evidence showed that "it was practically impossible for those in the vicinity of the locomotive to hear any other noise." Admittedly, the pas-

The case at bar:

It was all clear beyond the main line for a man who crossed from between the main line and track No. 1 to the east (geographically) of the main line.

The only noise was that of the diesel motors of Second 620. This did not prevent hearing the whistle of First 11. Every member of the crew of Second 620 who was at the head end testified that he heard it,—conductor Birdwell, engineer Ahlstrom, fireman Murray, and brakeman Newton. There were no atmospheric obstructions to vision.

---

1. An examination of the transcript shows that to the south of the tracks there were trees and houses which to some extent obstructed the vision so that a train coming from the west could not be seen until it rounded this first curve to the west. (Tr. 44)

The *Last Case*:

senger train blew its whistle, but apparently deceased did not hear it and 3 other witnesses in the vicinity testify they did not hear it. The extreme July heat resulted in heat waves on the desert and that plus the dust and smoke surrounding the engine made it difficult for anyone in the vicinity to see clearly for any great distance.

It was the duty of the deceased to take a signal from the rear end of the train and to do this he took his position opposite the cab of the locomotive. To get the signal it was necessary for him to be out at least as far as the eastbound track. "The presence of the cinder pile made it difficult if not impossible for deceased to station himself beyond and to the north of the eastbound tracks." As he was standing foul of the main line, he was struck by the *Chief* coming from the west.

"'On the day of the accident, "the Chief" was over 6 hours late. None of the crew of the freight train knew "the Chief" was still west of the freight train or had any reason to expect that it would pass them at Marmon."

The case at bar:

There was no evidence of necessity on the part of Miller to take a signal. Newton was there to take it. [The evidence showed, however, that it was customary for any man at the head end to look for it.] Deceased was not required to be foul of the main line in order to get it if the rear man moved out. He was not required to be foul of the main line to get it when First 11 was approaching for the signal would not be given in such circumstances. In any event, it was not necessary for him to be foul of the main line to get the signal because he could cross the main line, there being nothing to prevent it as in the *Last Case*.

First 11 was substantially on time. Every member of the crew of Second 620 knew it was north of them and was approaching. It could be plainly seen for 4.1 miles before it reached the head end of the Second 620. Con-

The Leet Case:	The case at bar:
The Chief was going 70 miles per hour when it rounded the last curve coming into Marmon. The engineer testified he tried to pick up speed on the down grade. There was evidence the speed was as high as 85 miles per hour when it struck Waits.	ductor Birdwell had called Miller's attention to it. Over a mile away the speed had been 79 miles an hour. It had been reduced to 70 and the train was decelerating not accelerating at the time of the accident. Its speed was down to 70 miles per hour 878 feet before it reached the head end of Second 620 and from there it decelerated to 60 miles per hour in approximately 700 feet.
The engineer whistled about ½ mile west of Marmon. He saw the deceased standing on the eastbound track about 800 feet away and then whistled up until the time of the accident. These whistles could not be heard. During the time he had observed the deceased,[2] the latter did not move and the engineer did not apply the brakes until he was 300 feet away where he lost sight of the deceased. It is obvious that in the circumstances the blowing of the whistle was useless. The speed at which the train was going had a material effect on the ability of the engineer to slow it or stop it after he saw the deceased and on the ability of the deceased to get out of the way after he saw or could have seen the train and on his ability	Running at 79 miles an hour and then decelerating it took First 11 approximately 4 minutes to travel from the point where it was first seen 4.1 miles away to the point of accident. Miller had plenty of time to observe it, and avoid it. Both its whistle and the dimming of its headlight gave notice that it was closely approaching. Its speed had no effect on Miller's ability to avoid it after his attention was called to it and after he should have seen it even if his attention had not been called to it. The engineer of First 11 never saw Miller and there is nothing in the case to show that he could have seen him or should have seen him. The speed of First 11 had no effect on his operation of the train.

2. When the deceased was first seen by the engineer of the Chief he was facing east i.e. he had his back to the oncoming train. (Tr. 573)

The *Leet Case:*

to see the train at all.[3] Atmospheric conditions were bad and the train came around the curve only 1200 feet away. At 70 miles an hour, without obstruction to vision due to atmospheric conditions, it was in sight less than 11 seconds,—at 70 miles an hour it would cover the 1200 feet in about 11 seconds.

The case at bar:

The short of the matter is that in the *Leet Case* it was known what the deceased was doing and how the accident happened and there were facts warranting the inference that if the speed had not been so high the engineer could have slowed his train more effectively, could have signaled more effectively and the deceased would have had an opportunity to get out of the way. In the case at bar we do not know what the deceased was doing or how the accident happened. There is no evidence which would sustain an inference that had the speed been lower the accident would not have happened. In the *Leet Case* there was no showing that the deceased knew the train was approaching. In the case at bar the deceased did know that the train was approaching and simply failed to keep out of its way.

It is respectfully submitted that the petition should be

---

3. The engineer of Waits' train saw the Chief approaching and, realizing that Waits did not know of its approach, himself blew two sharp blasts of his own whistle. This evidently attracted Waits' attention for the fireman of his train testified that after this signal Waits turned as if he was turning from the west trying to get out of the way. (Tr. 590) Had there been more time he might have succeeded. The time available depended on the speed at which the Chief was traveling.

granted, that the judgment below should be reversed on the authority of the *Jones Case,* and that if the *Jones Case* is no longer to be followed, it is for this Court to say so in forthright terms.

Dated at San Francisco, California, November 18, 1953.

ARTHUR B. DUNNE
Counsel for Petitioner